IN THE

Supreme Court of the United States

No.

MYRTLE FRANCES BROCKI,
Petitioner,

v.

AMERICAN EXPRESS COMPANY, a New York Joint Stock Association, and
DEMERY'S, INC., a New Jersey corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HAROLD HELPER and
MAX M. MARSTON,
Attorneys for Petitioner,
2037 First National Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

TABLE OF CONTENTS

	Page
Opinions of Lower Courts	2
Grounds Upon Which Jurisdiction is Based	2-3
Statute Authorizing Review	4
Question for Review	4
Constitutional Provision	5
Statement of the Case	5-7
Argument	8-16
Relief	17
Appendix:	
Memorandum Opinion of the District Court	19-21
Opinion of the United States Court of Appeals for the Sixth Circuit	22-27
Judgment of Circuit Court of Appeals	27

INDEX TO AUTHORITIES CITED

Cases

Gledhill v. Fisher Co., 272 Mich. 353 at 363	16
Hemphill v. Orloff, 238 Mich. 508 (judgment affirmed 277 U. S. 537, 72 L. Ed. 978)	14, 15
Neirbo Company v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 84 L. Ed. 167, 60 Sup. Ct. 153, 128 ALR 1437	13
Puerto Rico v. Russell Company, 288 U. S. 476, 53 S. Ct. 447, 77 L. Ed. 903	14
Trustees of Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518	16

Page

VanSant v. American Express Company, 169 Fed. (2d) 355 (C.C.A. 3, 1948)..... 2, 7
Williams v. Port Chester, 97 App. Div. 84, 89 N.Y.S. 671, affirmed 183 N. Y. 550; 76 N. E. 1116..... 11

Statutes

General Associations Law, Article 2, pars. 3, 4, 37.. 10, 11
Michigan Statutes Annotated 21.98..... 12
United States Code, Title 28, par. 1254..... 4
United States Code Annotated, Title 1, par. 1..... 11, 12

Constitutions

United States Constitution, Art. III, Sec. 2..... 4, 5
New York Constitution, Art. X, Sec. 4..... 9

Texts

McKinney's Consolidated Law of New York, Article 1, Section 2..... 9

IN THE

Supreme Court of the United States

No. .....

MYRTLE FRANCES BROCKI,
Petitioner,

v.

AMERICAN EXPRESS COMPANY, a New York Joint Stock Association, and
DEMERY'S, INC., a New Jersey corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To: The Honorable Supreme Court of the United States:

Myrtle Frances Brocki, Petitioner, respectfully petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, and represents:

OPINIONS OF LOWER COURTS

That she deems herself aggrieved and wronged by the judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division, dismissing her suit against American Express Company, and the judgment of the United States Court of Appeals for the Sixth Circuit affirming said judgment. Appended hereto is the opinion of the Judge of the District Court for the Eastern District of Michigan reported in 172 Fed. Supp. 648. The annexed opinion of the United States Court of Appeals for the Sixth Circuit affirming said judgment has not been reported officially or unofficially to this date.

GROUNDS UPON WHICH JURISDICTION IS BASED

Petitioner maintains that there are special and important reasons to review the instant judgment of the United States Court of Appeals for the Sixth Circuit. The most cogent reason is that the decision of said Court is in conflict with a decision of the United States Court of Appeals for the Third Circuit on the same matter: *VanSant v. American Express Company*, 169 Fed. (2d) 355 (C.C.A. 3, 1948). In *VanSant* the Third Circuit ruled it had diversity jurisdiction in an action against the Respondent, American Express Company:

> "Since this is a diversity of citizenship case, the conflict of laws rule to be applied must conform to that prevailing in the courts of the state wherein the district court sits."
>
> • • • • •
>
> "Appellant by her application to further amend her complaint seeks to allege that American Express 'a citizen, of the State of New York, is a joint

> stock association organized under the laws of New York'. American Express in opposing this says primarily that it is an unincorporated association with no citizenship of its own and cannot be sued in the federal courts on the basis of diversity. It also urges that as it had a member residing in Virginia when suit was commenced there is no diversity between it and appellant who is 'likewise alleged to reside in Virginia'.
>
> American Express is a joint stock association formed under the laws of the State of New York. *Mack v. American Express Co.*, 20 Misc. 215, 45 N. Y. S. 362. *As such it is considered for practical purposes a corporation by the courts of that state.*" (Citing New York cases) (Emphasis added.)

The Sixth Circuit rejected diversity jurisdiction against Respondent, American Express Company, because some of its stockholders were citizens of Michigan:

> "It follows that we must consider this to be an unincorporated association, and hence it cannot be deemed a citizen, apart from its members, for the purpose of diversity jurisdiction."

This Court should grant certiorari to resolve the conflict between the decisions of the Third and Sixth Circuits.

The question presented for review is also important because the American Express Company transacts business in many states of the United States and trial courts and litigants are entitled to know whether or not this organization is immune from suit in the Federal Courts because it lacks citizenship apart from the citizenship of its stockholders.

STATUTE AUTHORIZING REVIEW

The judgment of the United States Court of Appeals for the Sixth Circuit which Petitioner seeks to review was dated and entered in said Court on June 16, 1960.

The statutory provision which Petitioner believes confers jurisdiction on this Court to review the judgment in question by writ of certiorari is Title 28, paragraph 1254, of the United States Code which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

QUESTION FOR REVIEW

The question presented for review: Is the Respondent, American Express Company, (a New York statutory business association designated as a joint stock association but admitted to do business in Michigan as a New York corporation) a citizen of the State of New York so as to confer diversity jurisdiction on a Federal Court in Michigan to hear and determine a controversy between it and a citizen of Michigan pursuant to Article III, Section 2, of the Constitution of the United States?

The lower Courts decided that American Express Company was not an entity apart from its stockholders and the Federal Courts have no diversity jurisdiction.

Petitioner maintains that American Express Company is a legal entity and is a citizen of the State of New York for diversity jurisdiction.

CONSTITUTIONAL PROVISION

Article III, Section 2, of the Constitution of the United States vests in the Federal Courts jurisdiction over controversies between citizens of different states. The constitutional provision is as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—*between Citizens of different States*,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." (Emphasis added.)

STATEMENT OF THE CASE

(Numbers in parentheses refer to pages in Appellant's Appendix)

Petitioner commenced suit against the Respondent, American Express Company, in the United States District Court for the Eastern District of Michigan, Southern Division (2a, 3a, 4a, 5a). Her complaint alleged that she was a citizen of the State of Michigan and resided in the City of Detroit (2a); that the Respondent, American Express Company, was a corporation organized and existing under and by virtue of the laws of the State of New York, and that the Court had jurisdiction of the controversy because of the diversity of citizenship of the parties (2a). The Respondent, American Express Company, answered

the complaint and denied that it was a corporation (6a); it alleged that it was a joint stock association with its principal office in the City and State ow New York and had stockholder-members residing in Michigan (6a). The affidavit of Respondent's Senior Vice-President and Secretary in support of the motion to dismiss stated that it was "an unincorporated joint stock association organized and existing under the laws of the State of New York" (11a), and had more than 22,000 stockholder-members and more than 200 were residents of Michigan (11a).

The suit was commenced February 19, 1953, and, after pretrial hearing, the case was placed on the suspended docket by formal order of the District Court. This order was embodied in the record filed in the Court of Appeals, but was not printed in the appendix. The purpose of placing the case on the suspended docket of the Court was to give the parties an opportunity to ask Congress to grant relief to Petitioner on her claim which arose out of the refusal of the Veterans Administration to accept a timely dispatched American Express money order to pay a premium on her husband's National Service Life Insurance causing it to lapse (2a, 3a, 4a, 5a). After all efforts to secure Congressional relief failed, the Respondent, American Express Company, on February 17, 1959, filed a motion to dismiss (10a). The basis for the motion was lack of diversity of citizenship between the Petitioner and Respondent, American Express Company (10a).

Petitioner answered this motion and alleged that the Respondent, American Express Company, was a New York corporation (12a). She supported this allegation with the official certificate of the Michigan Corporation & Securities Commission bearing the seal of said State certifying that the "AMERICAN EXPRESS COMPANY, a New York

corporation," was admitted to do business in Michigan (14a), and that "The corporation has filed all annual reports, * * *", and that the certificate "is entitled to have full faith and credit given it in every court and office within the United States" (14a), *Respondent was not admitted to do business in Michigan as a joint stock association.*

The District Court filed an opinion in which it refused to follow *VanSant v. American Express Company,* 169 Fed. (2d) 355 (C.C.A. 3, 1948) (15a, 16a). The District Court ruled as a matter of law that Respondent, American Express Company had no citizenship apart from its stockholders and dismissed Petitioner's suit without trial on the merits (15a, 16a, 17a).

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. Petitioner submits that the Sixth Circuit erroneously failed to follow *VanSant v. American Express Company,* 169 Fed. (2d) 355 (C.C.A. 3, 1948), and affirmed the judgment of the District Court.

Petitioner maintains that the Respondent, American Express Company, is a legal entity separate and distinct from its stockholders because the organizing statutes of New York created a juridical person with New York citizenship, and, thus, a Federal Court in Michigan has diversity jurisdiction.

ARGUMENT

There is no question that Petitioner is a citizen of the State of Michigan. The only problem is whether or not the Respondent, American Express Company, licensed to do business in Michigan as a New York corporation, is a juridical person with New York citizenship.

Respondent, American Express Company, is a statutory association; it is not a common law association of any kind. It should not be judged by early concepts of common law joint stock companies. Its existence as a juridical person should be determined by the powers conferred upon it by the New lork Constitution and statutes, by the procedure which New York requires to create such an organization, and the managerial and financial structure which New York requires in order for such an association to exist. Petitioner contends that the end-result is a New York juridical person apart from the citizenship of its stockholders.

The New York joint stock association does not come into existence by contract between individuals as such organizations were formed at common law. It can exist only by complying with the statutory procedure.

Petitioner will show that New York, in authorizing the creation and operation of joint stock associations, intended to create artificial entities separate and distinct from their stockholders, and that such entities have characteristics of persons and corporations, including New York citizenship.

The New York Constitution and Statutes fix their rights, powers and basic methods of operation. The New York Constitutional provision relating to actions and suits by and against corporations provides (Article X, Section 4; of The Constitution of the State of New York):

"[CORPORATIONS; DEFINITION; RIGHT TO SUE AND BE SUED.]

The term corporations as used in this section, and in sections 1, 2 and 3 of this article shall be construed to include all associations and *joint-stock companies* having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the *right* to sue and shall be subject to be sued in all courts in like cases as *natural persons*." (Emphasis added.)

This Constitutional provision indicates clearly that a New York joint stock association has the *right* to be sued as a natural person. A creditor's action is thus an action against a body corporate and not against the stockholders. (Respondent has more than 22,000 stockholders, and more than 200 are in Michigan (11a)). Obviously such an organization is an artificial entity separate and distinct from its stockholders!

New York statutory joint stock associations have all the characteristics, rights, powers and privileges of corporations. The *General Associations Law of New York* provides for their organization. McKinney's Consolidated Law of New York, Article 1, Section 2, defines the term:

"2. *Definitions*

As used in this chapter: 1. The term 'joint stock association' includes every unincorporated joint stock association, company or enterprise having written articles of association and capital stock divided into shares, but does not include a corporation or a business trust.

* * * * *

3. The term 'stockholder' means every member of a joint stock association.

4. The term 'association,' as used in article four of this chapter, means a joint stock association or a business trust as defined in this section."

Respondent admits that it was created and exists by statutory law pertaining to joint stock associations. Accordingly, Respondent must have "written articles of association and capital stock divided into shares"; it has stockholders because every member of the association must be a stockholder.

Article 2, paragraph 3 of the *General Associations Law* sets forth the provisions which may be contained in the articles of association of a joint stock association. The articles of association of a joint stock association may:

> "1. Provide that the death of a stockholder thereof, or the transfer of his shares of stock therein, shall not work a dissolution of the association;
>
> 2. Prescribe the number of its directors, not less than three, to have the sole management of its affairs;
>
> 3. Contain any other provision for the management of its affairs not inconsistent with law."

The articles of association of a joint stock association contain every provision customarily found in corporate charters. The articles may provide that the association shall continue after the death of a stockholder, or the transfer of his shares. In the case at bar, Respondent has not advised the Court of the specific provisions of its articles of association, but because it has been admitted to do business in Michigan as a New York corporation since 1907 (14a), and because it has over 22,000 stockholder-members (11a), we can safely state that its articles comply with New York law and properly provide for the perpetuation of its business upon the death of stockholders or the transfer of their shares. The Respondent has not stated whether or not it has a board of directors, but the foregoing statute provides that the articles of association "Pre-

scribe the number of its directors, * * * to have the *sole management of its affairs*" (emphasis added). Respondent admits it does have a "Senior Vice President and Secretary." (11a).

The *General Associations Law* (Article 2, paragraph 4) commands that it regularly file certificates indicating the name and date of organization, the number of stockholders, names and residences of officers, its principal place of business, and other information.

From the total picture of what New York has created, Respondent is a juridical person which has New York citizenship for the purpose of diversity jurisdiction. In *Williams v. Port Chester*, 97 App. Div. 84, 89 N.Y.S. 671, affirmed 183 N.Y. 550, 76 N.E. 1116, the New York Courts tell us that in authorizing the organization of statutory joint stock associations the Legislature had "the intention * * * that the artificial citizens to be created by the legislature should, in so far as their civil rights were concerned, be placed upon an equal, not a better, footing than natural born citizens.

The statute clearly expressed New York's concept of a joint stock association as a person separate and distinct from its stockholders by the definition of the term "person". The General Associations Law of New York, Article 2, paragraph 37 (McKinney's Consolidated Laws of New York Annotated, Vol. 21) states:

> "The term person includes a corporation and a joint stock association * * *."

The Federal Congress has also recognized that a joint stock company may be an artificial person (1 U.S.C.A. par. 1):

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise—* * *.
>
> * * * * *
>
> the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and *joint stock companies*, as well as individuals;" (Emphasis added.)

Petitioner respectfully submits that the opinion of the Court of Appeals for the Sixth Circuit failed to give effect to the certificate bearing the seal of the State of Michigan (14a), evidencing Michigan's determination that the Respondent, American Express Company, was a New York corporation and that it was admitted to do business in that State only as a legal entity separate from its stockholders. The Respondent, by accepting the benefits conferred by its license to do business in Michigan, acknowledged corporate existence. Michigan citizens have the right to rely upon such determination by an official agency of their state. Federal Courts in Michigan should take cognizance of such determination. Under Michigan Law the Michigan Corporation & Securities Commission could have issued a certificate to the American Express Company to do business in Michigan as a joint stock association. It did not issue such certificate. The Michigan Statute permitting foreign business organizations to obtain authority to operate within its boundaries applies to joint stock associations (Mich. Stat. Ann. 21.98):

> "The term 'corporations' as used in sections 81 to 97, both inclusive, of this act shall be construed to include all associations, partnership associations limited, *joint stock companies* and common law trust or trusts created by statute, having any of the powers or privileges of corporations, not possessed by individuals or partnerships, *under whatever term or designation they may be defined and known in the state where organized.*" (Emphasis added.)

It was proper for the State of Michigan to create the state of facts under which it would give American Express Company the right to do business within its borders, and to permit it to enjoy this privilege only as a corporation. This principle was recognized by this Court in *Neirbo Company v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 84 L. Ed. 167, 60 Sup. Ct. 153, 128 ALR 1437. In *Neirbo* the problem was the constitutionality of a state law which required a foreign corporation to appoint a resident agent as a condition precedent to its right to do business in the state. Mr. Justice Frankfurter wrote that a foreign company was bound by the "bargain" which it made with the state:

> "The scope and meaning of such a designation as part of the bargain by which Bethlehem enjoys the business freedom of the State of New York, have been authoritatively determined by the Court of Appeals, speaking through Judge Cardozo: 'The stipulation is, therefore, a true contract' ".

The Court concluded:

> "We are recognizing that 'state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case.' ".

Plaintiff submits that Michigan determined a state of facts that Defendant had corporate existence, and Defendant accepted this determination as part of the "bargain" by which it "enjoys the business freedom" of the State of Michigan. This "state of facts" should "authorize the courts of the United States to take cognizance of a case."

Petitioner further submits that the decision of the United States Court of Appeals for the Sixth Circuit in the instant case is in conflict with the decisions of this Court in

Puerto Rico v. Russell Company, 288 U.S. 476, 53 S. Ct. 447, 77 L. Ed. 903, and *Hemphill v. Orloff*, 238 Mich. 508 (judgment affirmed 277 U.S. 537, 72 L. Ed. 978). In *Puerto Rico v. Russell Company*, *supra*, this Court determined that a limited partnership organized under the laws of Puerto Rico had citizenship independent of its members for diversity purposes. After reviewing Puerto Rican Statutes authorizing the creation of limited partnerships, the Court ruled that there was a "treatment of the aggregate * * * as a person distinct from its members, with capacity to perform all legal acts, made it possible and convenient to treat it so for purposes of federal jurisdiction as well". Thus, the limited partnership was "a juridical person". This Court summarized its powers as follows:

> "It may contract, own property and transact business, sue and be sued in its own name and right. * * * *Its members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant.* * * * It is created by articles of association filed as public records. * * * Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members. * * * Powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited, and they alone may perform acts legally binding on the *sociedad*. * * * Although the members whose participation is unlimited are made contingently liable for the debts of the *sociedad* in the event that its assets are insufficient to satisfy them * * * this liability is of no more consequence for present purposes than that imposed on corporate stockholders by the statutes of some states. * * * These characteristics under the Codes of Puerto Rico give content to their declaration that the *sociedad* is a juridical person. That personality is so

> complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a different status for purposes of federal jurisdiction than a corporation organized under that law." (Emphasis added.)

The New York creation is analogous. New York law provides that such association has the *right* to be sued as a corporation; it must have written articles of association; the articles must be filed as public records; its members must be stockholders; the death of a member or the transfer of his shares shall not operate to dissolve the association; it must have a board of directors consisting of not less than three persons, "to have the sole management of its affairs"; it may contract, own property and transact business as a separate entity. It is difficult to conceive of any more complete "juridical person" than the Respondent, American Express Company, as it is organized and as it does business throughout the nation for the benefit of more than 22,000 stockholder-investors!

In *Hemphill v. Orloff*, 277 U.S. 537, 72 L. Ed. 978, this Court affirmed the judgment of the Michigan Supreme Court (238 Mich. 508) and said (p. 550):

> "Whether a given association is called a corporation, partnership, or trust, is not the essential factor in determining the powers of a state concerning it. The real nature of the organization must be considered. *If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment.*" (Emphasis added.)

In this case the Court determined that a common law trust, generally known as a Massachusetts Trust, had corporate characteristics and personality so that it was "subject to similar treatment" as a corporation.

Respondent fits the classic definition of a corporation as defined by Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518, followed in *Gledhill v. Fisher Co.*, 272 Mich. 353 at 363:

> "The conception of Chief Justice Marshall of a corporation is set forth in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U. S.), 518. The fundamental conception of a private corporation created under the Constitution and law of this State is that it is an artificial entity authorized to be created to engage in any lawful business, separate and distinct from the holders of its individual stock, authorized by law to be created to enable persons to pool their interests to the extent of their several contributions to the capital stock to carry on such lawful business by the venture or stake of its capital stock in manufacturing trade or commerce."

Petitioner submits that Respondent, American Express Company, is a New York juridical person as such artificial person is known to the law; that it has the citizenship of its state of organization, the same as a corporation has citizenship; that the District Court should have entertained her suit because of the diversity of citizenship of the parties and determined the controversy on its merits.

RELIEF

Wherefore, Petitioner prays that a writ of certiorari issue out of and under the seal of this Court to review the proceedings and judgment of the United States Court of Appeals for the Sixth Circuit, and after such review, that the judgment of said Court and of the District Court dismissing Petitioner's suit may be set aside, and vacated, and that this case be remanded to the District Court for trial on the merits.

Respectfully submitted,

HAROLD HELPER &
MAX M. MARSTON,

By: .....,

Attorneys for Petitioner,
2037 First National Building,
Detroit 26, Michigan.

APPENDIX

IN THE

District Court of the United States

for the Eastern District of Michigan, Southern Division

MYRTLE FRANCES BROCKI, *Plaintiff*, v. AMERICAN EXPRESS COMPANY, a New York corporation, *Defendant & Third-party Plaintiff*, v. DEMERY'S INC., a New Jersey corporation, *Third-party Defendant*.	Civil Action No 12,502

MEMORANDUM

Defendant American Express has filed a motion to dismiss for lack of jurisdiction. Plaintiff is a Michigan citizen. Defendant is an unincorporated joint stock association having more than 200 stockholder-members living in Michigan at the time this suit was commenced, according to the affidavit of a Senior Vice President and Secretary of American Express.

Plaintiff relies on M.S.A. 27.664 and Van Sant v. American Express Co., 169 F. (2d) 355, 370-372 (3 Cir., 1948) as its mainstays. She also seems to derive surcease from the opinion of Judge McAllister, American Federation of Musicians v. Stein, 213 F. (2d) 679 (6 Cir., 1954) which cites Van Sant in an apparently favorable manner. The issue under consideration here is a narrow one—For purposes of diversity jurisdiction, what method is the proper

one to be used in determining the citizenship of an unincorporated joint stock association? Defendant relies on a long line of cases commencing with Chapman v. Burney, 129 U. S. 677, and concluding with Swan v. First Church of Christ, Scientist, in Boston, 225 F. (2d) 745 (9 Cir., 1955). The Swan case makes reference to both the Van Sant case, supra, and the American Federation of Musicians case, supra. As to each, the Swan case contains a footnote commentary which could not express the views of this Court in a more precise manner.

M.S.A. 27.664 deals with capacity to sue. It does not purport to confer federal jurisdiction. It is not applicable to the problem at hand since no question is raised concerning capacity. The Van Sant case is a bit confusing to this writer. The part that might have application is found at page 370-372. We are convinced, however, that the Court's primary concern there had to do with capacity and that any observations as to jurisdiction are purely dicta and not determinative of any issue directly before that Court. The Court's attention there was directed toward a different question entirely, and the "distinction between suability and citizenship in this Constitutional sense may have been overlooked." Swan v. First Church of Christ, Scientist, in Boston, supra, page 748, footnote 3. The American Federation of Musicians case, supra, we are not able to accept as controlling the issue here. The Court's viewpoint there must be taken in the setting of that case which was a review of the propriety of a trial court's retention of jurisdiction for issuing a preliminary injunction to preserve the status quo until the trial court might go into the question there involved. It is expressed most aptly in the Swann case, supra, page 747, footnote 2.

We believe there is no authority —that would justify this Court in upsetting the well established rule as it is set forth in the Swan case, supra, (and by this Court in a prior case[1]) to the effect that the citizenship of its members determines the citizenship of an organization such as we have here for purposes of diversity jurisdiction. There being members who are Michigan citizens, and the plaintiff being

a Michigan citizen, it follows that diversity jurisdiction is lacking.

An order may be presented accordingly.

Dated at Detroit, Michigan, this 21st day of April, A. D. 1959.

Thomas P. Thornton,
United States District Judge.

---

[1] *Murphy v. Hotel & Restaurant Employees & Bartenders International Union*, 102 F. Supp. 458 (1951).

No. 13,933

UNITED STATES COURT OF APPEALS

for the Sixth Circuit

MYRTLE FRANCES BROCKI, *Appellant,* vs. AMERICAN EXPRESS COMPANY, an Unincorporated Joint Stock Association, *Appellee,* and DEMERY'S INC., a New Jersey Corporation, *Third-Party Defendant-Appellee.*	APPEAL from the District Court of the United States for the Eastern District of Michigan, Southern Division.

Decided June 16, 1960.

Before: CECIL, WEICK and POPE, Circuit Judges.

POPE, Circuit Judge.

On February 19, 1953, appellant, a citizen of Michigan, filed this action in the court below against defendant American Express Company, which was alleged to be "a corporation organized and existing under and by virtue of the laws of the State of New York." The sole basis claimed for jurisdiction was diversity of citizenship of the parties. The defendant first answered denying the allegation that it was a corporation and alleging that it was an unincorporated joint-stock association having its principal office in New York City and having stockholder-members resident in the State of Michigan and other states and asserting that it had no citizenship other than that of its stockholder members.

Approximately six years after the filing of the complaint (apparently no steps looking to trial had then been taken), American Express Company filed a motion to dismiss the action for want of jurisdiction. The motion was supported by an affidavit of an officer of the defendant stating that American Express Company was an unincorporated joint-stock association organized and existing under the laws of the State of New York; that it maintained its principal office there, and also maintained offices in the State of Michigan, in which latter state more than 200 of its stockholder-members were resident. Plaintiff resisted this motion, asserting that under the law of the State of Michigan defendant "is regarded as a New York corporation" and that it is "suable in Michigan as a corporation by the name by which it is known." There was no controversy as to the statute under which defendant was organized.

The trial court, holding that diversity jurisdiction was lacking dismissed the action.

It seems plain that jurisdiction may be sustained here only if defendant can be held to be a corporation of the State of New York. The fact that it may be sued by its common name is not enough. Swan v. Church of Christ, Scientist, 9 Cir., 225 F. 2d 745, 747. Nor is it enough to say that defendant's organization has many features which permit it to operate and carry on its functions in a manner indistinguishable from that followed by corporations. Arbuthnot v. State Automobile Insurance Association, 10 Cir., 264 F. 2d 260, 262.

And it also seems plain that whether this defendant was made a corporation by New York depends upon the law of New York. It is significant here that the statute under which defendant was organized negatives an intention to treat such a joint-stock association as a corporation. Article I, §2, of the General Associations Law (McKinney's Consolidated Law of New York Ann., Vol. 18A), provides: "As used in this chapter: (1) the term 'joint stock association' includes every unincorporated joint stock association, company or enterprise having written articles of associa-

tion and capital stock divided into shares, but does not include a corporation or a business trust."

The New York courts have occasion to consider whether similar joint-stock associations are, or are not, corporations. They have said they are not.

In People ex rel. Winchester v. Coleman, 133 N. Y. 279, 31 N. E. 96, the court was dealing with the question whether the National Express Company, a joint-stock association of that state, was properly regarded as a corporation. After viewing the history of New York legislation relating to such organizations, the court said, 31 N. E. at 97-98: "These last and quite recent enactments show that the legislative intent is still to preserve and not destroy the original difference between the two classes of organizations; to maintain in full force the common law liability of associates, and not to substitute for it that of corporators; and, preserving in continued operation that normal and distinctive difference, to evince a plain purpose not to merge the two organizations in one, or destroy the boundaries which separate them."

That case was cited and followed in Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108, where the court was considering the status of Adams Express Company of New York.[1]

---

[1] Judge Hiscock said (82 N. E. 111): "Of course, there can be no doubt that a joint-stock association differs from a corporation, or that in its original conception and ultimate analysis it is like a partnership in respect to the individual liability of its members. . . ." Proceeding, he noted the many attributes of a corporation which the modern joint-stock association has acquired, and called this a "quasi corporate entity". Judge Bartlett's concurrence (p. 1117) said: "It is unnecessary to point out in detail the very great difference between the joint-stock association and a corporation." Judge Werners' separate concurrence, in which some of the other judges also concurred, said (p. 118). "But the company is concededly not a corporation, although our statutes have invested it with certain corporate attributes."

It follows that we must consider this to be an unincorporated association, and hence it cannot be deemed a citizen, apart from its members, for the purpose of diversity jurisdiction. Chapman v. Barney, 129 U. S. 677; Great Southern Fireproof Hotel Co. v. Jones, 177 U. S. 449; Thomas v. Board of Trustees, 195 U. S. 207; Fred Macey Co. v. Macey, 6 Cir., 135 F. 725; Taylor v. Weir, 3 Cir., 171 F. 636; Rowntree v. Adams Express Co., 8 Cir., 165 F. 152.[2]

Appellant cites the provision of Article X §4 of the New York Constitution: "The term corporations as used in this section, and in sections 1, 2 and 3 of this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons." This means no more than that for the purposes stated in those sections—1, 2, 3 and 4 of Article X, joint-stock companies are subject to the same regulation as corporations. Attorney General v. Hill Davis Co., 261 Mich. 89, 245 N. W. 579. That such a provision does not suffice to make them corporations for the purpose of diversity of citizenship was noted in Fred Macey Co. v. Macey, supra.

Appellant cites Van Sant v. American Express Co., 3 Cir., 169 F. 2d 355. Of that case, the trial court properly said: "We are convinced, however, that the Court's pri-

---

[2] Cf. Hart and Wechsler, "The Federal Courts and The Federal System", p. 917: "Unincorporated associations have never been accorded a status as jural persons for purposes of diversity jurisdiction, nor has there developed a presumption of a single citizenship of the members. This is so even when by the applicable law they have the capacity to sue and be sued in the association name. The citizenship of all the members must be looked to, and not merely that of the officers and managers."

And see Moore's Federal Practice, 2nd Ed., Vol. 3, p. 1412: "But in cases where jurisdiction is founded upon diversity of citizenship it is held that, although capacity has been accorded the unincorporated association to sue or be sued in its common name the citizenship of the individual members must, nevertheless, be made to appear, and their citizenship must be wholly diverse from that of the opposing party or parties."

mary concern there had to do with capacity and that any observations as to jurisdiction are purely dicta and not determinative of any issue directly before that Court. The Court's attention there was directed toward a different question entirely, and the 'distinction between suability and citizenship in this Constitutional sense may have been overlooked.' Swan v. First Church of Christ, Scientist, in Boston, supra, p. 748, footnote 3."

There is nothing unusual about provisions in state statutes that for the purposes of those acts joint stock associations, and other similar organizations, should be treated as corporations. Michigan has such a statute.[3] The validity of that provision has been upheld. Hemphill v. Orloff, 238 Mich. 508, 213 N. W. 867, affirmed 277 U. S. 537.[4] But such provisions do not operate to make such foreign organizations corporations for the purpose of diversity jurisdiction. The Michigan court itself has repeatedly held that for purposes other than those specially named in this statute, and in its constitution, which is similar to the New York constitution previously referred to, the distinction between corporations and unincorporated organizations such as this appellee is fully recognized. Michigan Trust Co. v. Herpolsheimer, 256 Mich. 589, 240 N. W. 6 (explaining Hemp-

[3] §97, Michigan General Corporation Act (M. S. A., §21.98): "The term 'corporations' as used in §§81 to 97, both inclusive, of this act shall be construed to include all associations, partnership associations limited joint stock companies and common law trust or trusts created by statute having any of the powers or privileges of corporations, not possessed by individuals or partnerships, under whatever term or designation they may be defined and known in the state where organized."

Hence a foreign joint stock association, entering Michigan, is required by this section and one of the sections mentioned therein to procure a certificate of authority from a Michigan commission, in the same manner as if it were a foreign corporation.

[4] The record shows that appellee here complied with that requirement and procured a certificate of compliance from the Michigan Corporation and Securities Commission. The certificate described American Express Company as a New York corporation.

hill v. Orloff, supra); Attorney General v. Hill-Davis Co., 261 Mich. 89, 245 N. W. 579, 580.[5]

It is not questioned that should a state endow a business organization, by whatever name called, with all the powers and characteristics of a corporation, without declaring it not to be one, it might be found to be a corporation for diversity purposes. Such a case was Puerto Rico v. Russell & Company, 288 U. S. 476. That case dealt with a *sociedad* under the code of Puerto Rico, which carried the traditions of the civil law. But in deciding that case the court recognized the continued force of its decisions in Chapman v. Barney, 129 U. S. 677, and Great Southern Fireproof Hotel Co. v. Jones, 177 U. S. 449.[6] Here the New York statutes and the New York decisions have long, as we have noted, indicated that state's policy not to make organizations like appellee association corporations of that state. This purpose cannot be ignored.

The judgment is affirmed.

JUDGMENT

(Filed June 16, 1960)

Appeal from the United States District Court for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

---

[5] "This express enumeration in the Constitution of the purposes for which partnership associations are declared to be corporations is an implied exclusion of their being corporations for other purposes."

[6] Said Court: (288 U. S. 480) "The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnership. Chapman v. Barney, supra; Great Southern Fireproof Hotel Co. v. Jones, supra. The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise. Therefore, to call the *sociedad en comandita* a limited partnership in the common law sense, as the respondents and others have done, is to invoke a false analogy."